Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ARTHUR BOYNE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

ARTHUR BOYNE
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22 pg

QUESTIONS PRESENTED

Under Florida law a timely filed motion to withdraw plea is a direct proceeding requiring the appointment of counsel to represent an indigent defendant. If the motion is denied and an appeal is taken the appeal becomes a first time direct appeal as of right requiring the appointment of counsel for the appeal. The questions presented are:

1. Is it a violation of the Sixth Amendment to deny an indigent defendant appointment of counsel on a motion to withdraw plea, especially when the trial court found the motion was timely filed and the claim cognizable when a plea agreement was breached 18 months after sentencing?

2. If then the motion is denied and an appeal is taken is it a violation of the Fourteenth Amendment to deny appointment of counsel for the appeal?

PARTIES TO THE PROCEEDING

The Parties to the Proceeding are Arthur Boyne, the Petitioner, a Pro Se incarcerated litigant serving a life sentence in a Florida prison. The Respondent named below is Michael W. Moore, Secretary of the Florida Department of Corrections. Representing the State of Florida is John Tanner, State Attorney of the Seventh Judicial Circuit; and Robert A. Butterworth, Attorney General.

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PETITION FOR WRIT OF CERTIORARI

Arthur Boyne respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., infra, 1a) is unreported. The earlier opinions and orders of the Supreme Court of Florida and Florida District Court of Appeal and Florida Seventh Judicial Circuit (App., infra, 2a-8a) are unreported.

JURISDICTION

The Supreme Court of Florida entered its judgment on October 5, 2001 (App., infra, 2a). The judgment on Petition for Rehearing was entered on February 14, 2002 (App., infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT

This case arises from a Petition for Writ of Habeas Corpus filed in the Supreme Court of Florida pursuant to Article V, section 3(b)(9) of the Florida Constitution on May 21, 2001, by Arthur Boyne (Petitioner) to challenge the constitutional validity of the denial of his right to counsel under the Sixth and Fourteenth Amendment by the State of Florida.

STATEMENT OF THE CASE

On February 11, 1993, the Petitioner pled guilty to first degree murder pursuant to a plea agreement to serve a life sentence in another state, and was sent to Arizona State Prison. Prior to which he had asked his lawyer to withdraw the plea, because it had been coerced by threats and a beating that took place during the plea hearing. His lawyer refused and when asked to appeal, he refused this also.

On August 29, 1994, the state breached the plea agreement by returning the Petitioner to Florida. The

Petitioner filed a request to appoint counsel with the trial court and on November 4, 1994, filed a motion to withdraw plea. The motion raised seven (7) claims: (1) he was actually innocent; (2) the plea had been coerced by threats and a beating; (3) violation of due process; (4) violation of equal protection; (5) violation of the Fourth Amendment; (6) breach of agreement not to be sent to prison; and (7) breach of plea agreement to serve the sentence out-of-state.

On January 31, 1995, the trial judge denied the request to appoint counsel holding the Petitioner did not have that right (App., infra, 3a), and also summarily denied motion to withdraw plea without conducting a hearing (App., infra, 4a). However, the trial judge did find the claim that the state breached the plea agreement was timely made and the Petitioner was entitled to raise it, since the motion was filed contemporaneously with the breach (App., infra, 5a). The other six claims were denied as untimely. The claim that the state breached the plea agreement by returning the Petitioner to Florida was denied as a recommendation not binding on the court (App., infra, 6a).

On February 8, 1995, Petitioner filed notice of Appeal and motion to appoint counsel on appeal. The trial judge never answered the motion and he was forced to brief his direct appeal *pro se*. The Fifth District Court of Appeal (5th DCA) affirmed without opinion on December 15, 1995, *Boyne v. State*, 664 So.2d 260 (Fla. 5th DCA 1995). The Supreme Court of Florida denied review, *Boyne v. State*, 666 So.2d 142 (Fla. 1995).

While the appeal was still pending the Petitioner moved the 5th DCA to clarify whether it was being considered under direct or collateral review (App., infra, 9a). The court refused to do so (App., infra, 8a). In addition, both the trial judge and the 5th DCA granted the Petitioner leave to proceed on appeal as indigent, but both refused to appoint counsel.

Petitioner subsequently sought collateral relief in state and federal court, including this Court, *Boyne v. Moore*, ___ U.S. ___, 121 S.Ct. 1606 (2001), but never previously raised the claim he was denied his right to counsel. This is because both the trial judge and the 5th DCA held he was not entitled to counsel. In addition, Petitioner was advised by Terrence E. Kehoe, his post-conviction counsel, on July 1, 1997, that there was no Florida law entitling him to counsel 18 months after sentencing. This was despite the fact this is when the state breached the plea agreement.

On August 25, 1999, the decision made in *Padgett v. State*, 743 So.2d 70 (Fla. 4th DCA 1999) changed this law in the following manner:

> . . . A defendant who files a *timely* motion to withdraw plea after sentencing pursuant to rule 3.170(l) is entitled to file a direct appeal from that guilty or nolo plea pursuant to Florida Rule of Appellate Procedure 9.140(b)(2)(B)(iii) and may challenge the issues raised by the rule 3.170(l) motion . . . Thus, we conclude that a motion filed pursuant to rule 3.170(l) does not amount to a collateral attack upon the conviction, but rather is a critical stage in the direct criminal proceeding against the defendant at

> which the accused must be entitled to effective assistance of counsel.[4] (emphasis added)
>
> [4] We have found no other cases which directly address this issue . . .

Padgett v. State, 743 So.2d at 73 & n.4. The key words here are *timely filed*. Based on the fact the trial judge deemed the motion timely filed, the Petitioner is now entitled to raise the claim he was denied his Sixth and Fourteenth Amendment right to counsel. On May 21, 2001, he raised this claim in a Petition for Writ of Habeas Corpus filed in the Supreme Court of Florida. On October 5, 2001, the Petition was denied as procedurally barred (App., infra, 2a). The court held a "habeas corpus is not a second appeal and cannot be used to relitigate issues which should have been or were raised on appeal or in prior post-conviction filings." A motion for rehearing was denied on February 14, 2002 (App., infra, 1a).

THE DECISIONS BELOW WERE ERRONEOUS

The Sixth Amendment right to counsel at every critical stage of a criminal proceeding was established by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Fourteenth Amendment right to counsel on a first time direct appeal as a right was established by *Douglas v. California*, 372 U.S. 353 (1963). Recently, *Padgett v. State*, *supra*, for the first time defined that under Florida law, for a motion to withdraw plea to constitute a critical stage of the direct criminal proceeding, thereby requiring the appointment of counsel, it must be deemed timely filed. The appeal

from its denial then becomes a direct appeal requiring the appointment of counsel also.

The Petitioner's motion was deemed timely filed by the trial judge (App., infra, 5a), but denied his request for counsel on both the motion and the appeal (App., infra, 3a). This violates the Petitioner's Sixth and Fourteenth Amendment right to counsel. This also violates his right to a direct appeal as of right altogether since he was not represented by counsel for the appeal.

These errors occurred because the trial judge mischaracterized the motion as a collateral proceeding without the right to counsel (App., infra, 3a). The reason for this is the motion was not filed until 18 months after sentencing when the state breached the plea agreement (App., infra, 5a). The 5th DCA made the same error in failing to clarify the status of the appeal – direct or collateral (App., infra, 8a & 9a), and then by affirming the trial judge's decision without opinion.

It is beyond dispute that if Petitioner had filed his motion to withdraw plea the day after sentencing, Florida would have provided him counsel and with counsel as of right for any subsequent appeal. It shouldn't matter if the state's breach occurs one day or 18 months later. The constitution either guarantees the right to counsel or it doesn't.

Over 90% of all criminal convictions are a result of guilty pleas made in exchange for promises by the state to make concessions. Many of these concessions are ongoing in nature and last for the life of the sentence.

The right to counsel guaranteed by the constitution must be held to last as long as the state's promise.

THE REASON THE PETITION SHOULD BE GRANTED

The reason the Petition should be granted is to give clear direction to the states – that the right to counsel under the Sixth and Fourteenth Amendment applies at whatever point in time they violate the conditions of a plea agreement. Otherwise, states can continue to promise defendants future concessions to induce guilty pleas, and then with impunity fail to keep their promise.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR BOYNE, *Pro se*

Supreme Court of Florida

THURSDAY, FEBRUARY 14, 2002

CASE NO.: SC01-1186
Lower Tribunal No.:

ARTHUR BOYNE vs. MICHAEL W. MOORE, ETC.

Petitioner(s) Respondent(s)

The Petitioner's Motion for Rehearing is hereby denied.

WELLS, C.J., and SHAW, HARDING, ANSTEAD and PARIENTE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON. JOHN TANNER
ARTHUR BOYNE
LOUIS A. VARGAS
HON. ROBERT A. BUTTERWORTH

Supreme Court of Florida

FRIDAY, OCTOBER 5, 2001

ARTHUR BOYNE,	**	
Petitioner,	**	CASE NO.
vs.	**	SC01-1186
MICHAEL W. MOORE, etc.,	**	
Respondent.	**	

ORDER

Petitioner has filed a Petition for Writ of Habeas Corpus. The Petition is denied as procedurally barred. *See Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) (habeas corpus is not a second appeal and cannot be used to relitigate issues which should have been or were raised on appeal or in prior post-conviction filings).

WELLS, C.J., and SHAW, HARDING, ANSTEAD and PARIENTE, JJ., concur.

True Copy
TEST:

[SEAL]

/s/ Thomas D. Hall
Clerk, Supreme Court

BHP

cc: Hon. Robert A. Butterworth
Hon. John Tanner
Arthur Boyne
Louis A. Vargas

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 92-30658

STATE OF FLORIDA

v.

ARTHUR BOYNE

_____/

ORDER DENYING REQUEST FOR COUNSEL

THIS MATTER is before the Court on Defendant's pro se Request for Counsel; and the Court having considered the Motion and being duly informed about the premises, hereby FINDS AS FOLLOWS:

That the Defendant is not entitled to his request for Counsel. Therefore, it is hereby

ORDERED AND ADJUDGED, that the Defendant's Request for Counsel is **DENIED.**

DONE AND ORDERED this 31st day of January, 1995, in Chambers at Daytona Beach, Volusia County, Florida.

/s/ Gayle Graziano
GAYLE GRAZIANO,
CIRCUIT JUDGE

cc: Defendant
Office of the State Attorney

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 92-30658

STATE OF FLORIDA

v.

ARTHUR BOYNE

_____/

ORDER DENYING MOTION TO WITHDRAW PLEA

THIS MATTER is before the Court on Defendant's pro se Motion to Withdraw his plea in the above styled case; the Court having considered the Motion, and having reviewed the record; and, the Court being duly informed about the premises, hereby FINDS AS FOLLOWS:

On February 11, 1993, Defendant plead guilty to first degree murder. In Defendant's Plea Agreement the prosecutor: recommended life imprisonment, not to serve less than 25 years before becoming eligible for parole; and, recommended an interstate compact agreement. Mr. Boyne was also sentenced on February 11, 1993, to a 25 year minimum mandatory sentence in the Florida Department of Corrections with 359 days credit for jail time. Further the court recommended an interstate compact agreement.

In support of his claim, the Defendant alleges that he agreed to plead guilty and to be sentenced to a 25 minimum mandatory sentence, provided he would not be imprisoned in Florida, pursuant to an interstate compact

agreement. The Defendant further states that he is entitled to withdraw his plea because the State violated his plea agreement by transferring him from Arizona State Prison, back to Florida, 8/27/94. Defendant also makes claims of ineffective assistance, denial of due process, violation of equal protection, and violation of 4th amendment rights, in support of his petition for plea withdrawal.

Defendant is untimely for his claims supporting a plea withdrawal, with the exception of the claim that a provision in his sentencing has been breached. Because, the Defendant was transferred from Arizona State Prison back to Florida, August 27, 1994, the Defendant is entitled to raise the claim that he did not receive the charge or sentence concessions contemplated by the plea agreement. The Defendant claims that it is the Interstate Compact Provision which was breached on August 27, 1994, upon his return to Florida. The Supreme Court of Florida in *Williamson v. State*, 316 So.2d 267 (Fla. S.Ct. 1975), held:

> (a) the Court should allow a defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a *timely* motion for withdrawal, proves the withdrawal is necessary to correct a "manifest injustice."
>
> (i) A motion for withdrawal is *timely* if made with due diligence, considering the nature of allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.
>
> (ii) withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
>
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
>
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;
>
> (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or
>
> (5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm the plea after being advised that the court no longer concurred and being called to either affirm or withdraw his plea. *Id.* at 273.

Although not untimely, this claim is refuted by the record. The prosecutor's recommendations, in the plea agreement, are merely recommendations. The written plea agreement states that the Defendant understands that the Trial Court Judge is not bound by any recommendations or agreements of the prosecutor as to the Defendant's sentence. In turn, the Court has no authority over the Department of Corrections. The Defendant was advised that the Court had no authority over the Department of Corrections and could only recommend out-of-

state placement, which the Court and State did in compliance with the plea agreement. Therefore, the trial Court is under no obligation to allow the Defendant to withdraw his plea. See, *State v. Adams*, 342 So.2d 818 (Fla. 1977); *Stewart v. State*, 511 So.2d 375 (Fla. 1st DCA 1987).

Thus, the record conclusively demonstrates that the Court merely recommended and did not promise, nor could it promise, an interstate compact agreement; and, it had no obligation to be bound by the recommendations of the Prosecutor in the Plea Agreement (Appendix A).

THEREFORE, the Defendant is not entitled to the relief requested for the reasons discussed above.

ORDERED AND ADJUDGED, that the Defendant's Motion to Withdraw his Plea in the above styled case is **DENIED.**

DONE AND ORDERED this 31st day of January, 1995, in Chambers at Daytona Beach, Volusia County, Florida.

/s/ Gayle Graziano
GAYLE GRAZIANO,
CIRCUIT JUDGE

cc: Defendant
Office of the State Attorney

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

ARTHUR BOYNE,
Appellant.

v.

CASE NO. 95-737

STATE OF FLORDA,
Appellee.
_____/

DATE: October 18, 1995

BY ORDER OF THE COURT:

ORDERED that Appellant's unauthorized MOTION, filed September 18, 1995, is stricken. Appellant's MOTION TO SEAL OPINION, filed July 13, 1995, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

[SEAL]

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Arthur Boyne
Office of the Attorney General,
Daytona Beach

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT FLORIDA

ARTHUR BOYNE,

Appellant,

CASE NO. 95-737

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION
TO DETERMINE A QUESTION OF LAW

Comes now the Appellant, Arthur Boyne, pro se, and asks this Court whether the above styled cause as a matter of law is under direct review or under collateral review. This question is not material to this now pending appeal or the issues to this appeal, however, the answer to this question guarantees the exercise of other procedural and constitutional matters.

Respectfully submitted,

ARTHUR BOYNE
ARTHUR BOYNE, 621094, Pro Se
Century Correctional Institution
P.O. Box 248
Century, Florida 32535-0248

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Anthony

Golden, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, this 13th day of September, 1995.

/s/ Arthur Boyne
Arthur Boyne